
United States Court of Appeals for Veterans Claims

Vet. App. No. 15-2135

BENNIE RUIZ, JR.,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The appellant, Bennie Ruiz, Jr., appeals the April 14, 2015 decision of the Board of Veterans' Appeals (Board) that denied his claim for entitlement to service connection for a low back disability. Record Before the Agency ("R.") at 2-15. On April 13, 2016, Mr. Ruiz filed an initial brief (App. Br.) in which he argued that vacatur and remand are required because the Board failed to provide adequate reasons and bases as to whether the evidence of record establishes that Mr. Ruiz is entitled to service connection based on continuity of symptomatology pursuant to 38 C.F.R. § 3.303(b). 38 U.S.C. § 7104(d)(1); App. Br. 9-16. Alternatively, Mr. Ruiz argued that the Board's finding that the duty to assist was satisfied is clearly erroneous as the Board relied on an inadequate medical examination. 38 U.S.C. § 5013A; App. Br. 16-21. Mr. Ruiz also argued in the alternative that the Board failed to provide an adequate statement of reasons or bases as to the probative value of the evidence of record, including the May 1970 medical examination and Mr. Ruiz's lay testimony. 38 U.S.C. § 7104(d)(1); App. Br. at 21-24.

The Secretary filed a responsive brief (Sec. Br.) on July 25, 2016, in which he urges this Court to affirm the Board's decision. The Secretary argues that § 3.303(b) does not apply in this case and that the Board provided an adequate statement of reasons and bases for its finding that Mr. Ruiz's back condition is not related to service. Sec. Br. at 19-29. The Secretary also argues that the Board fulfilled its duty to assist Mr. Ruiz because the September 2010 and April 2013 VA examinations, upon which the Board relied, are adequate and probative. 38 U.S.C. § 5103A; Sec. Br. at 13-19. For the reasons explained below, and in Mr. Ruiz's initial brief, the Court should reject the

Secretary's arguments and vacate the Board's decision and remand the claim with instructions to provide an adequate statement of reasons or bases for its findings and/or an adequate medical opinion. 38 U.S.C. §§ 5103A, 7104(d)(1).

ARGUMENT

I. THE SECRETARY HAS FAILED TO DEMONSTRATE THAT 38 C.F.R. § 3.303(b) IS INAPPLICABLE IN THIS CASE.

In his initial brief, Mr. Ruiz argued that the Board failed to provide an adequate statement of reasons or bases as to whether service connection could be established for Mr. Ruiz's back condition under 38 C.F.R. § 3.303(b). R. at 11 (2-15); App. Br. at 9-16. In his brief, the Secretary argues that the Board did not err in finding that service connection was not warranted based on 38 C.F.R. § 3.303(b) as Mr. Ruiz is diagnosed with "acute lumbar strain," which is not an enumerated condition within 38 C.F.R. § 3.309(a) and because arthritis was not diagnosed until 2010. Sec. Br. at 19-25. However, not only does § 3.303(b) apply in this case, but Mr. Ruiz's service treatment records and lay statements demonstrate continuity of symptomatology sufficient to establish service connection based on § 3.303(b), and the Secretary's arguments to the contrary must be rejected.

A. The record does not support the Secretary's argument that Mr. Ruiz's current back disability is not listed as a chronic condition in 38 C.F.R. § 3.309(a).

The Secretary argues that 38 C.F.R. § 3.303(b) does not apply in this case because "lumbar strain" and "compression fracture" are not chronic conditions enumerated in 38 C.F.R. § 3.309(a). R. at 11 (2-15); Sec. Br. 22. However, the Secretary's argument that

§ 3.303(b) is inapplicable in this case demonstrates a misunderstanding of the law and the evidence of record. Although Mr. Ruiz has been diagnosed with lumbar strain, the Board conceded and the record establishes that Mr. Ruiz has been diagnosed with degenerative joint disease. R. at 11 (2-15); 113 (111-30). It is well-established that degenerative joint disease is synonymous with osteoarthritis. *Greyzck v. West*, 12 Vet. App. 288, 291 (1999) (“the term *osteoarthritis* is a synonym of the terms *degenerative arthritis* and *degenerative joint disease*”) (citing STEDMAN’S MEDICAL DICTIONARY 149, 1267 (26th ed. 1995)); *Giglio v. Derwinski*, 2 Vet. App. 560, 561 (1992); *see also* MERRIAM-WEBSTER’S MEDICAL DICTIONARY 164 (Roger W. Pease, Jr., ed. 1995). The Court has noted that the VA has also definitively determined that degenerative joint disease (or “DJD”) is arthritis. *Lichtenfels v. Derwinski*, 1 Vet. App. 484, 486 (1991); 38 C.F.R. § 4.71a. Arthritis is explicitly listed as a chronic condition under 38 C.F.R. § 3.309(a), and is therefore subject to service connection under 38 C.F.R. § 3.303(b). *See Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed. Cir. 2013) (holding that § 3.303(b) is implicitly constrained by § 3.309(a) in chronic disease cases); *see also* R. at 123 (111-30) (April 2013 examiner found that Mr. Ruiz has arthritis). Thus, Mr. Ruiz’s condition is included in § 3.309(a) such that § 3.303(b) applies.

B. The Secretary’s argument that 38 C.F.R. § 3.303(b) does not apply because arthritis was not “noted” in service is based on a misunderstanding of law.

The Secretary also argues that 38 C.F.R. § 3.303(b) does not apply in this case because Mr. Ruiz’s “arthritis was not noted during his military service nor was any other ‘chronic’ lumbar spine disorder listed under 38 C.F.R. § 3.309(a).” Sec. Br. 22.

However, the Secretary once again incorrectly applies the law to the evidence of record. Namely, Mr. Ruiz's service treatment records and lay evidence of record are replete with complaints of back pain and this evidence is sufficient to both "note" the condition in service and establish continuity of symptomatology, which is all that is required under § 3.303(b). *See Walker*, 708 F.3d at 1336 ("Proven continuity of symptomatology establishes the link, or nexus, between the current disease and serves as the evidentiary tool to confirm the existence of the chronic disease while in service . . .").

Section 3.303(b) provides that evidence of continuity of symptomatology is required "where the condition *noted* during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned." 38 C.F.R. § 3.303(b) (emphasis added). In order to show that a condition was "noted" during service, it is not necessary for there to be an in-service diagnosis of the chronic condition; rather, the description of symptoms is more important than the specific in-service diagnosis assigned to them. Indeed, where the evidence demonstrates a legitimate in-service diagnosis, *no* evidence of nexus (lay *or* medical) is required. *See id.*; *Walker*, 708 F.3d at 1335-36. This Court has held that even lay testimony alone is competent and sufficient for the "noting" of a condition in service, so long as the condition is one that can be perceived by a lay individual. *Savage*, 10 Vet. App. 488, 497 (1997). Further, "symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." *Savage v. Gober*, 10 Vet. App. 488, 496 (1997); *see also Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991) ("regulation requires continuity of symptomatology, not continuity of treatment").

Thus, based on the plain language of § 3.303(b) and the Court's interpretation thereof, Mr. Ruiz is not required to have a clear diagnosis of arthritis in service in order to show service connection based on continuity of symptomatology; rather, symptoms *noted* in service and continuity of that symptomatology are sufficient. *Walker*, 708 F.3d at 1336 (“Proven continuity of symptomatology establishes the link, or nexus, between the current disease and serves as the evidentiary tool to confirm the existence of the chronic disease while in service”). Here, the Secretary argues that § 3.303(b) does not apply because Mr. Ruiz's “arthritis was not noted during his military service nor was any other ‘chronic’ lumbar spine disorder listed under 38 C.F.R. § 3.309(a);” however, this argument is tantamount to requiring a diagnosis of the chronic condition in service. Sec. Br. 22. As stated, neither this Court in *Savage*, the Federal Circuit in *Walker*, nor the plain language of § 3.303(b) require an in-service diagnosis in order to establish service connection based on continuity of symptomatology. Instead, the law requires only a “notation” in service of a symptom related to the chronic condition in question. *Savage*, 10 Vet. App. at 497. Here, Mr. Ruiz's service treatment records include evidence of back pain, a symptom of his now-diagnosed arthritis, and this is sufficient to establish that the condition was “noted” in service. R. at 1322.

The Secretary also argues that “a mere notation of joint pain, or in this case lumbar strain, in service does not trigger applicability of 38 C.F.R. § 3.303(b) for arthritis that was diagnosed at some later date.” Sec. Br. 25. Mr. Ruiz does not contest this proposition; however, the Secretary mischaracterizes the evidence by failing to account for the fact that the evidence of record does not *only* includes a “mere notation of joint

pain” in service, but rather, it includes evidence of continuity of symptomatology of Mr. Ruiz’s back condition. Indeed, the record is replete with evidence that Mr. Ruiz has suffered from continuity of symptomatology related to his back condition. App. Br. 11-13; *see, e.g.*, R. at 1322; 81; 128 (111-30); 761 (760-68); 1387 (1384-93). Thus, despite the Secretary’s arguments that § 3.303(b) does not apply, the evidence of record establishes that Mr. Ruiz’s symptoms were noted in service and he has experienced a continuity of symptomatology related to his chronic condition sufficient to trigger application of § 3.303(b), and the Board’s failure to provide an adequate statement of reasons or bases applying that provision of law requires vacatur and remand.

C. The Secretary’s argument that Mr. Ruiz’s statements are not competent evidence is based on a misunderstanding of 38 C.F.R. § 3.303(b).

In its decision, the Board considered Mr. Ruiz’s lay statements regarding his continuity of symptomatology but found that “[w]hile the Veteran believes that his current low back disability is related to service, as a lay person, the Veteran has not shown that he has specialized training sufficient to render such an opinion.” R. at 12 (2-15). The Secretary defends the Board’s finding and contends that “the Board did not have to make a credibility determination to find Appellant not competent to make opinions on nexus.” Sec. Br. 24-25. However, both the Board’s and the Secretary’s focus on whether Mr. Ruiz is competent to make a medical opinion regarding nexus is misplaced. Instead, the analysis should have been centered on whether Mr. Ruiz is competent and credible to make lay statements about his back pain symptoms during and since service, or in other words, the continuity of symptomatology of his back condition.

A veteran may testify about his or her own features or symptoms. *Layno v. Brown*, 6 Vet. App. 465, 470 (1994). A veteran's lay testimony about his or her symptoms cannot be rejected as not credible merely because contemporaneous medical records are silent as to complaints, symptoms or treatment for the relevant condition. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *Barr v. Nicholson*, 21 Vet. App. 303, 310 (2007); *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006). Additionally, "[p]roven continuity of symptomatology establishes the link, or nexus, between the current disease and serves as the evidentiary tool to confirm the existence of the chronic disease while in service" *Walker*, 708 F.3d at 1336.

Here, the Board erred in disregarding Mr. Ruiz's lay statements about his condition under the pretext that he was not competent to offer a medical nexus opinion. Instead, these lay statements should have been considered in the context of whether Mr. Ruiz complained of his back pain during and after service, and he is competent to do so. *Layno*, 6 Vet. App. at 470. Additionally of note, the Federal Circuit's holding in *Buchanan*—that silent contemporaneous medical records cannot, by itself, render lay testimony uncredible—takes on a special meaning in this case because Mr. Ruiz would have had contemporaneous medical records corroborating his lay statements about his in-service symptoms but for the fact that the hospital to which he was referred for bed rest and physical therapy after his injury was unable to accept him at that time because it was at capacity. 451 F.3d at 1336-37; R. at 1322; 7 (2-15). Thus, had the Board appropriately considered the lay evidence within the context of establishing service connection via continuity of symptomatology under 38 C.F.R. § 3.303(b), the Board

would have determined that Mr. Ruiz's statements were both competent and credible. Thus, vacatur and remand are required for the Board to make a finding in the first instance as to the competency and credibility of Mr. Ruiz's statements of continuity of symptomatology.

II. THE SECRETARY HAS FAILED TO DEMONSTRATE THAT THE BOARD FULFILLED ITS DUTY TO OBTAIN A MEDICAL OPINION THAT IS ADEQUATE FOR IT TO DETERMINE WHETHER SERVICE CONNECTION IS WARRANTED UNDER 38 C.F.R. § 3.303(B).

In his initial brief, Mr. Ruiz argued that even assuming that Mr. Ruiz's lay statements alone are not sufficient to establish entitlement to service connection and a medical opinion is required, vacatur and remand are required because the Board erred in relying on the negative September 2010 and April 2013 VA nexus opinions as they are based on an inaccurate factual premise related to Mr. Ruiz's employment. 38 U.S.C. § 5103A. On the contrary, the Secretary argued that the September 2010 and April 2013 VA examinations were adequate because they were "based on a complete review of the claims, consideration of all accurate and relevant facts, and were supported with detailed rationales." Sec. Br. 18.

Both the September 2010 and April 2013 examiners provided as their rationales that Mr. Ruiz:

[G]ives a history working for the post office carrying heavy loads and in 1985 was treated for back strain and was found to have an old compression fracture of L-1. He states that he had back problems from the time of his injury in 1968 . . . The veteran worked for the post office as a mail carrier until 2005, 20 years after the strain treated in 1985. Therefore, the veteran's current back injury is less likely as not (less than 50 percent probability) related to the single diagnosis of a mild back strain during service in 1968.

R. at 768 (760-68); 113 (111-30). However, Mr. Ruiz has expressly testified that although he worked for the post office for twenty years, he did not carry heavy loads:

I had a Post Office job. Mail carrier, you know just delivering mail and magazines. And that's what I did, you know. You know, businesses, mostly carrying like supplies, expresses, you know. Mostly mail and magazines. Because I went to businesses like dentists, doctors and LG doctors, lawyers and stuff like that. It was just a message-type dealing mostly with mail and magazines that I took in . . . No, no heavy lifting.

R. at 1388 (1384-1393).

The only possible way to read the September 2010 and April 2013 opinions is the examiners found that Mr. Ruiz's post office job entailed heavy lifting that injured his back. Any other reading would call into question the relevance of discussing Mr. Ruiz's occupation at all in the context of considering service connection for a back injury. However, because the September 2010 and April 2013 examiners relied on the inaccurate factual premise that Mr. Ruiz's career at the post office included heavy lifting, the opinions should be afforded no weight. *See Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (holding that if an examiner's opinion relies on an inaccurate factual premise, then it must be offered no weight). Therefore, the Board erred in relying on these inadequate medical opinions in considering Mr. Ruiz's claim for service connection for his back. 38 U.S.C. §5103A.

III. ADDITIONALLY, THE SECRETARY FAILED TO DEMONSTRATE THE RELEVANCE OF THE 1970 MEDICAL RECORD.

In its decision, the Board placed a great deal of weight on a May 1970 medical record that included an x-ray of Mr. Ruiz's lumbar and thoracic spine that yielded normal results. R. at 7 (2-15); 1221-31. In fact, in considering the adequacy of the examinations

of record, the Board found the negative September 2010 and April 2013 VA opinions more probative than the favorable private October 2010 and November 2010 opinions because neither of the private examiners “had access to the VA examination in 1970.” R. at 7 (2-15).

The Secretary argues that the Board’s reliance on the May 1970 x-ray report was appropriate as the Board is responsible for assigning probative value to the evidence. Sec. Br. 26. The Secretary also purports that Appellant “merely disagrees with the Board’s decision to place higher probative value on the May 1970 x-ray report over his lay statements.” App. Br. at 22-23; Sec. Br. 27. However, the VA’s reliance on the May 1970 x-ray is misplaced for two reasons.

First, the Board cannot use the existence of the May 1970 x-ray report as a reason to discount some examinations and not others when *none* of the examinations referenced the evidence in their opinions. R. at 7 (2-15); 39-41; 111-30; 311; 760-68. Specifically, none of the negative VA opinions relied on by the Board reference the May 1970 x-ray report and the Board did not provide any analysis as to how the favorable opinions are less probative than the negative opinions because they fail to cite the x-ray reports when *none* of these opinions cite to that record. *Id.*

Secondly, the Board erred in characterizing the 1970 x-ray report as negative evidence because when a fracture occurred and whether and when it would be seen on x-ray examination are medical determinations that none of the examiners discussed and the Board is not permitted to make independently. *See Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991) (holding that the Board may only consider independent medical evidence to

support its findings rather than provide its own medial judgment in the guise of a Board opinion). Here, none of the negative VA opinions considered the 1970 x-ray evidence, so the Board could not assign probative value to the x-ray report without resorting to medical speculation.

Thus, contrary to the Secretary's contentions, Mr. Ruiz does not argue that the Board erred in placing higher probative value on the May 1970 x-ray report than on his lay statements; rather, Mr. Ruiz's argument is that the Board erred in reaching a medical conclusion as to the probative nature of this x-ray report and assigning disparate weight as it applies to different medical examinations within the record. As a result, the Board's statement of reasons or bases for denying the claim is inadequate and vacatur and remand are required.

CONCLUSION

For the foregoing reasons, Mr. Ruiz respectfully requests that this Court issue an Order vacating and remanding the Board's April 14, 2015 decision denying Mr. Ruiz entitlement to service connection for a low back disorder, and remanding the claim for the Board to ensure compliance with the duty to assist and to provide an adequate statement of reasons or bases for its findings.

Respectfully submitted,

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